

SENATE BILL NO. 338

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/16/04

Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to actionable claims against state employees; relating to the state's
2 defense and indemnification of its employees and former employees with respect to
3 claims arising out of conduct that is within the scope of employment; amending the
4 Public Employment Relations Act regarding claims against the state or state employees;
5 and providing for an effective date."

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 * **Section 1.** AS 09.50 is amended by adding new sections to read:

8 **Sec. 09.50.253. Actionable claims against state employees.** (a) Except as
9 provided in (f) of this section, the remedy against the state provided by AS 09.50.250
10 for injury or loss of property, or personal injury or death arising or resulting from the
11 act or omission of an employee of the state while acting within the scope of the
12 employee's office or employment is exclusive of any other civil action or proceeding
13 for money damages by reason of the same subject matter against the employee whose

1 act or omission gave rise to the claim or against the estate of the employee. Any other
2 civil action or proceeding for money damages arising out of or relating to the same
3 subject matter against the employee or the employee's estate is precluded without
4 regard to when the act or omission occurred.

5 (b) A state employee against whom such a civil action or proceeding is
6 brought shall deliver, within the time after date of service or knowledge of service
7 determined by the attorney general, all pleadings and process served upon the
8 employee, or a copy of the papers served, to the person designated by the head of the
9 employee's agency to receive such papers. The state employee also shall give notice
10 of the civil action or proceeding by promptly furnishing to the attorney general and to
11 the head of the employee's state agency copies of the pleadings and process delivered
12 under this subsection. The giving of notice under this subsection to the attorney
13 general constitutes an agreement by the employee to cooperate with the attorney
14 general in the state employee's defense of the action or proceeding, and a consent that
15 the attorney general conduct the defense as the attorney general deems advisable and
16 in the best interests of the employee, including settlement in the attorney general's
17 discretion.

18 (c) Upon certification by the attorney general that the state employee was
19 acting within the scope of the employee's office or employment at the time of the
20 incident out of which the claim arose, any civil action or proceeding commenced upon
21 the claim in a state court is deemed an action or proceeding against the state under the
22 provisions of this title and the state is substituted as the party defendant. The civil
23 action or proceeding certified under this subsection is subject to the same limitations
24 and defenses applicable to an action or proceeding against the state. The attorney
25 general or the attorney general's designee shall defend the civil action or proceeding in
26 which the state was substituted as the party defendant under this subsection.

27 (d) If the attorney general refuses to certify under (c) of this section, the state
28 employee may at any time before trial petition the superior court to find and certify
29 that the employee was acting within the scope of the employee's office or employment
30 at the time of the incident out of which the claim arose. Upon such a certification by
31 the court, the civil action is deemed to be a civil action or proceeding brought against

1 the state under the provisions of this title and the state is substituted as the party
 2 defendant. A copy of the petition under this subsection shall be served upon the state
 3 in accordance with the provisions of Rule 4(d)(7) of the Alaska Rules of Civil
 4 Procedure. The petition to the superior court is the exclusive remedy to challenge the
 5 noncertification decision by the attorney general of a state employee under this
 6 section.

7 (e) A claim or suit for damages may not be filed against the state or the
 8 attorney general arising out of the process for certification under this section.

9 (f) This section does not extend or apply to a civil action or proceeding against
 10 an employee of the state that is brought for a violation of the Constitution of the
 11 United States, or that is brought for a violation of a statute of the State of Alaska under
 12 which such an action or proceeding against an employee is expressly authorized.

13 **Sec. 09.50.254. Defense and indemnification of state employees.** (a)
 14 Except as otherwise provided in AS 09.50.254 - 09.50.257, the state shall provide
 15 legal defense of civil claims against, and pay settlements and judgments including
 16 attorney fees and costs entered against, a state employee if the claims, settlements, or
 17 judgments are based on acts or omissions that occurred during the course and within
 18 the scope of the employee's employment with a state agency and are not covered by
 19 AS 09.50.253.

20 (b) The state does not have an obligation to defend or indemnify if the

21 (1) acts or omissions at issue were a result of gross negligence or
 22 intentional or wilful misconduct on the part of the employee; however, the state may
 23 not, based solely on an allegation of gross negligence or intentional or wilful
 24 misconduct made by a party other than the state agency employing the state employee,
 25 withhold legal defense in a civil action;

26 (2) acts or omissions at issue were not within the scope of the
 27 employee's employment with a state agency;

28 (3) acts or omissions at issue are covered by AS 09.50.253;

29 (4) claim or action involves a disciplinary, administrative, or criminal
 30 matter brought against the employee or is an appeal from a disciplinary,
 31 administrative, or criminal action;

1 (5) civil claim or action is based on conduct for which the employee
 2 has been convicted of a criminal offense or was terminated from employment by the
 3 state agency employing the state employee; or

4 (6) state employee settled or compromised the claim or action before
 5 requesting the state to provide legal defense or indemnification or while a request for
 6 defense was pending.

7 (c) The state does not have an obligation to pay an award for punitive damages
 8 against an employee.

9 (d) Defense or indemnification provided to a state employee under this section
 10 does not constitute a waiver, limitation, or expansion of sovereign immunity or of
 11 other immunity.

12 (e) If a legal defense is required under this section, the attorney general shall
 13 provide legal services to the employee under the procedures set out in AS 09.50.253.

14 (f) This section applies to a former state employee to the same extent as a
 15 current state employee.

16 **Sec. 09.50.255. Employee's duties when requesting defense and**
 17 **indemnification.** (a) The state's obligation to defend and indemnify a state employee
 18 under AS 09.50.254 - 09.50.257 arises only if the employee

19 (1) complies with the notice process set out in AS 09.50.253(b); and

20 (2) cooperates in the defense and resolution of the claim or action.

21 (b) A state employee for whom the state has provided legal defense under
 22 AS 09.50.254 - 09.50.257 or who has a request for the provision of legal defense
 23 pending may not settle the claim brought against the employee unless the attorney
 24 general approves the settlement.

25 (c) If the state has provided legal defense and indemnification under
 26 AS 09.50.254 - 09.50.257, the attorney general may settle a claim or action without
 27 the consent of the employee so long as the settlement resolves all the outstanding
 28 claims against the employee.

29 (d) This section applies to a former state employee to the same extent as a
 30 current state employee.

31 **Sec. 09.50.256. Employee's rights if the state declines to provide legal**

1 **defense.** (a) If the state declines to provide a legal defense for a state employee under
 2 AS 09.50.254 - 09.50.257, the attorney general shall provide the employee with
 3 written notice of that decision within 60 days after receiving a request for legal
 4 defense from the employee, or after service of the summons and complaint on the
 5 employee, whichever is later.

6 (b) A state employee whose legal defense is declined under AS 09.50.254 -
 7 09.50.257 may file a petition for legal defense in the superior court. The employee
 8 must file the petition within 30 days after the employee received the written notice of
 9 refusal to defend from the attorney general. A copy of the petition under this
 10 subsection shall be served upon the state in accordance with Rule 4(d)(7) of the
 11 Alaska Rules of Civil Procedure.

12 (c) If a state employee who has been denied legal defense settles the claim or
 13 action without filing a petition under (b) of this section, the employee waives any right
 14 to defense or indemnification.

15 (d) If the court grants a petition under this section, the attorney general shall
 16 undertake the defense of the employee.

17 (e) This section is the exclusive means for resolving a dispute about
 18 representation under AS 09.50.254 - 09.50.257.

19 (f) This section applies to a former state employee to the same extent as a
 20 current state employee.

21 **Sec. 09.50.257. Defense with reservation of rights; denial of**
 22 **indemnification; employee liability for expenses.** (a) The state may undertake the
 23 defense of a state employee under AS 09.50.254 - 09.50.257 while contesting the
 24 obligation to indemnify the employee, either partially or fully. If the state offers a
 25 defense with a reservation of rights to an employee, the attorney general may provide
 26 a legal defense and place limitations on the agreement to indemnify an employee
 27 pending the outcome of the case.

28 (b) If the state denies indemnification or offers a defense with a reservation of
 29 rights to an employee, the attorney general shall provide written notice to the
 30 employee. The notice must include the reason for the denial or reservation of rights.

31 (c) If the state has defended an employee under AS 09.50.254 - 09.50.257, the

1 attorney general may bring an action against the employee for expenses incurred in the
 2 defense if the trier of fact found that the employee's conduct was not within the course
 3 or scope of employment. The action for expenses under this subsection must be
 4 brought not later than one year after the execution of a written agreement settling the
 5 underlying claim or action or entry of final judgment in the action.

6 (d) This section applies to a former state employee to the same extent as a
 7 current state employee.

8 * **Sec. 2.** AS 09.50.300 is amended to read:

9 **Sec. 09.50.300. Compromise by attorney general. Except as provided in**
 10 **AS 09.50.253 - 09.50.257, the** [THE] attorney general may, with the approval of the
 11 court, arbitrate, compromise, or settle any action filed under AS 09.50.250 -
 12 09.50.300.

13 * **Sec. 3.** AS 09.50 is amended by adding a new section to article 3 to read:

14 **Sec. 09.50.301. Definitions for AS 09.50.253 - 09.50.257.** In AS 09.50.253 -
 15 09.50.257,

16 (1) "acting within the scope of the employee's office or employment"
 17 means acts or omissions

18 (A) that the state employee is employed or authorized to
 19 perform;

20 (B) of the state employee that occur substantially within the
 21 authorized time and space limit;

22 (C) that are activated by a purpose to serve the state; and

23 (D) that do not constitute acting, or failing to act, with willful,
 24 reckless, or intentional misconduct, or with gross negligence or malice;

25 (2) "settlement" means the execution of a written agreement settling
 26 the claim or action that gave rise to the employer's obligation to defend or indemnify
 27 the state employee;

28 (3) "state employee"

29 (A) means

30 (i) a permanent, probationary, seasonal, temporary,
 31 provisional, or nonpermanent employee in the executive, legislative, or

1 judicial branch of the state government, whether in the classified,
2 partially exempt, or exempt service; or

3 (ii) a person appointed to a board or commission of the
4 state government;

5 (B) does not include an employee of

6 (i) the University of Alaska;

7 (ii) the Alaska Railroad Corporation; or

8 (iii) a political subdivision of the state, including a
9 regional educational attendance area.

10 * **Sec. 4.** AS 23.40.075 is amended to read:

11 **Sec. 23.40.075. Items not subject to bargaining.** The parties may not
12 negotiate terms contrary to the

13 (1) reemployment rights for injured state employees under
14 AS 39.25.158;

15 (2) reemployment rights of the organized militia under AS 26.05.075;

16 (3) authority of the Department of Health and Social Services under
17 AS 47.27.035 to assign Alaska temporary assistance program participants to a work
18 activity considered appropriate by the Department of Health and Social Services; [OR]

19 (4) authority for agencies to create temporary positions under
20 AS 47.27.055(c);

21 **(5) provisions of AS 09.50.250 - 09.50.300.**

22 * **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to
23 read:

24 TRANSITION. Nothing in this Act terminates or modifies a collective bargaining
25 agreement in effect on the effective date of this Act; however, for a collective bargaining
26 agreement between a state agency and an organization representing state employees that
27 expires before July 1, 2004, the new agreement may not contain provisions contrary to this
28 Act.

29 * **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to
30 read:

31 APPLICABILITY. This Act applies to a cause of action that arose on or after the

1 effective date of this Act.

2 * **Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to
3 read:

4 REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the
5 heading of art. 3 of AS 09.50 from "Article 3. Claims Against State" to "Article 3. Claims
6 Against the State or State Employees."

7 * **Sec. 8.** This Act takes effect immediately under AS 01.10.070(c).